No. 3436

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

F. M. HATHAWAY, and FANNIE S. WINCHELL, as Admininstratrix of the Estate of V. W. WINCHELL, Deceased, and F. M. HATHAWAY, as Administrator of the Partneship Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly Doing Business under the Firm Name and Style of EUGENE FORD AUTO COMPANY,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

ISHAM N. SMITH,
Attorney for Appellants.

Suite 612 American Bank Bldg.
Seattle, Wasihngton.

PRESS OF PLINY L. ALLEN CO., INC., SEATTLE

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STATEMENT OF THE CASE.

For several years prior to 1916 F. M. Hathaway and V. W. Winchell were doing business at Eugene, Oregon, as Eugene Ford Motor Company, and were handling automobiles and automobile parts. They dealt almost exclusively in Ford Motor Company products.

Sept. 10, 1915, they made a contract with Ford Motor Company (Tr. pp. 9-36) relative to their business for 1916.

Thereafter, on May 25, 1916, Ford Motor Company attempted to cancel that contract, and thereafter on June 3, 1916, filed its action in replevin, seeking to recover possession of certain property described particularly in its complaint (see par. 6, Amended Complaint in Replevin, Tr. pp. 259-262.) Thereafter, on June 10, 1916, the Ford Motor Company paid $12,676.25 to the First National Bank at Eugene, Oregon, in satisfaction of mortgages which Winchell and Hathwaay had given the bank upon certain Ford automobiles.

On August 14, 1916, the Ford Company filed its Amended Complaint in the Replevin case alleging:

VII.

That thereafter plaintiff pursuant to the terms of said contract with the defendents mentioned in the last preceding paragraph, duly cancelled said contract and offered $16,077.50, the money advanced on said consignment of automobiles by the above-mentioned defendants to said defendants in payment and satisfaction as provided for in said contract, and that defendants then refused and ever since have refused to receive the same; that the plaintiff was at the time of said tender ready and willing and able to pay said amount thereof to the defendants, and that since said offer plaintiff has been ready, willing and able to pay the sum of thirty-four hundred and one and 12-100 dollars ($3401.12), which amount

in the defendants' Winchell and Hathaway, property in said cars at this time, and that plaintiff now brings the said sum of thirty-four hundred and one and 12-100 dollars into this court in this action, ready to be paid to defendants.

On June 14, 1916, these appellants answered the original complaint in the replevin action; and

On July 28, 1916, Ford Motor Company filed its reply thereto. (Tr. pp. 269-271). Both the answer and reply was permitted to stand as such after the amended complaint was filed.

The trial of the replevin case resulted in verdict for Winchell and Hathaway against Ford Motor Company for $16,077.50, together with $6,000.00 damages, whereupon judgment was entered, which was thereafter affirmed by this Court in,

> *Ford Motor Co., vs. Winchell et al.,* 245 Fed. 850.

THE PRESENT CASE.

After the mandate from this Court was filed, Ford Motor Company brought this suit, (Tr. pp. 3-37) seeking to enjoin the enforcement of the judgment in replevin, and to offset the amount paid by it to the bank (Tr. pp. 8-9), and procured a temporary restraining order and show cause order therein. (Tr. pp. 37-43).

On March 16, 1918, Winchell and Hathaway filed their answer to the bill, claiming that the matters involved were Res Adjudicata, and pleading estop-

pel. Defendants attached to their answer in equity the pleadings in the replevin case (Tr. pp. 64-67), and also a copy of a petition and motion for new trial filed therein by the Ford Motor Company (Tr. pp. 75-79); and accompanied the answer with a motion to dissolve the restraining order and dismiss the case, supporting such motion by the affidavits of Luke L. Goodrich, F. M. Hathaway, N. W. Winchell, and P. E. Snodgrass. (Tr. pp. 80-90)

The matter was heard before Judge Wolverton, who on March 25, 1918, filed an order dissolving the order to show cause and denying the application restraining order (Tr. pp. 91-92). *No appeal was ever taken from this order, although involved the merits of the controversy.*

Thereafter on March 27, 1913, Ford Motor Company paid the judgment in replevin for $22,077.50, with the interest and costs.

Thereafter on August 2, 1918, that Company filed its amended bill, wherein it sought decree for money judgment,viz., to recover $12,676.38, with the interest from Sept. 11, 1916, basing its alleged right of recovery on two theories:

First: That Winchell and Hathaway executed the mortgages to the bank as agents of the Ford Motor Company upon its property, and converted the moneys thus obtained to their own use; and by payment to the bank the Ford Motor Company became subrogated to the rights of the mortgagee and

Second: That the mortgage of Winchell and Hathaway to the bank was upon their lien on said automobiles which they acquired by paying to Ford Motor Company 85% of the purchase price of the automobiles described in the mortgage before they took the cars in their possession, and that such payment was necessary to enable the Ford Company to repossess itself of its property.

On Sept. 13, 1918, these appellants filed their motion to strike the Amended Bill and dismiss the case (Tr. pp. 109-116) upon the grounds,

1. That the matters involved were Res Adjudicata as to title and right of possession of the automobiles, and the alleged equities arising out of the payment to the bank;

2. That the preliminary injunction was dissolved, and no appeal taken;

3. That the payment to the bank was adjudged in the Replevin action to be voluntary and no rights of subrogation existed;

4. That the charges of embezzlement and conversion were wrongfully inserted in the Amended Complaint, and were in conflict with the Adjudication in the replevin case.

Sept. 30, 1918, this motion was overruled (Tr. pp. 117-118), and thereafter on Jan. 24, 1919, these appellants filed their answer in the suit (Tr. pp. 118 to 177), denying the equities of the Bill, and affirmatively re-alleged the proceedings in the re-

plevin case, asserting that all matters in the Bill were Res Adjudicata, and pleading estoppel.

Defendants also sought to recover $800.00 as deposit money paid to Ford Motor Company when the contract was made (Tr. pp. 157-159), and the additional sum of $1900.00 as rebates from sales of automobiles (Tr. pp. 159-161).

July 18, 1919, the appellee filed its reply and the cause was tried that day.

Thereafter the Court entered its decree (Tr. pp. 181-182) in favor of appellee for the recovery of the sum paid by it to the bank with interest, less the deposit money and certain rebates.

On Aug. 4, 1919, appellants filed their motion for re-hearing and re-argument, also objections to decree, (Tr. pp. 183-191), which were thereafter argued and were overruled, Oct. 6, 1919 (Tr. pp. 192).

Thereafter on Dec. 4, 1919, petition for appeal (Tr pp. 193-195) accompanied by assignments of errors (Tr. pp. 195-209) was filed and served, and this appeal perfected.

ASSIGNMENTS OF ERRORS.

The appellants assert that the lower court erred against their just rights in the following particulars for the following reasons:

1.

In refusing to strike the Amended Bill and to dismiss the case because:

(a) The matters involved were Res Adjudicata as to title and right of possession of the automobiles;

(b) The payment by appellee to the bank was in truth and in fact voluntary and had been so adjudged; because in the replevin case the question of the payment to the bank was brought directly in issue under paragraph VII of the Amended Complaint, and the proceedings had at the trial; and thereafter upon motion for a new trial and to counterclaim the amount paid to the bank against the judgment; the rulings thereon were adverse to the Ford Company, and on review in that case errors were predicated involving these questions and were never argued, but were abandoned, and thereby all matters relating to said payment became Res Adjudicata.

(c) Appellants mortgaged the automobiles as their own, for their own benefit, and did not mortgage them as agents for the Ford Motor Company, nor obtain money thereon as such agents nor convert any money of the Ford Motor Company;

(d) The preliminary injunction sought in this cause was denied, no appeal taken therefrom, and the hearing on the application therefor involved the merits of this case, and thereby became Res Adjudicata;

(e) The Ford Motor Company voluntarily paid the judgment in replevin in full while this case was pending.

The Court erred in rendering decree for Ford Co. because

2.

The merits of this cause were decided in the replevin case, adversely to it; and,

3.

The payment by Ford Motor Company to the bank was not made by reason of any duty arising by contract or law or any privity by contract or otherwise, but such payment was wholly voluntary;

4.

The evidence is insufficient to sustain the decree in the particulars hereafter shown;

5.

Appellee did not come into Court with clean hands, because;

(a) It wrongfully terminated its contract with appellants;

(b) It made no demand for possession before instituting replevin suit;

(c) It made no tender of any sum or of the deposit money or rebates before starting the replevin case;

(d) It trespassed upon the business of the defendants wrongfully and used the process of replevin maliciously.

6.

The Court erred in failing to render decree for appellants; and,

7.

In overruling and denying the motion for rehearing and reargument made after decree.

On this appeal the appellants rely upon the following

POINTS AND AUTHORITIES.

Point 1.

By the answer in replevin the title to the property involved was brought in controversy. The judgment in that case in appellants' favor was *Res Adjudicata* as to title.

Bauer v. Rynd et al (Cal.) 150 Pac. 780.

Point 2.

Section 1251 B. U. S. Compiled Statutes 1916, Vol. II, p. 223, requires the litigation of equitable rights in actions at law and adopts the reformed procedure which prevails in many State Courts.

United States vs. Richardson, 223, Fed. 1010.

Burroughs Adding Machine Co. vs. Scandinavian Bank, 239, Fed. 179.

U. P. R. Co. vs. Says, 246, Fed. 561.

Maine Northwestern Development Co., vs. Northwestern Commercial Co., (9 C. C. A.)

Upson Nut Co., vs. American Shipbuilding Co., 251 Fed. 707.

Point 3.

Under the reformed procedure, the several State Courts hold that in replevin actions all legal and equitable rights of the parties *inter sese* arising out

of, connected with, relating to, or depending upon, the contract and the property involved, must be tried.

Zimmerman Wells Co., vs. Sunset Lumber Co., 57 Oregon, 309; 11 Pac. 690; 32 L. R. A. N. S. 123.

Cobbey on Replevin, 2nd Ed. Sec. 1148.

Brook vs. Bayless, 6th Okla., 568; 52 Pac. 738-739.

Emerson-Brantigham Implement Co., vs. Ritter, (Okla.) 170 Pac. 482 (483 et seq.) collating cases.

Gilbert vs. Husted, 50 Wash. 61; 96 Pac. 835 (per Rudkin J.).

McCormick Harvesting Machine Co., vs. Hill, 79 S. W. 745; 104 Mo. App. 544.

Ramey & Bro. vs. Capshaw, 75 S. W. 479, 71 Ark. 408.

Collins vs. Leather Co., 190 S. W. 990 (Mo. App.)

34 CYC 1418—Note 88.

Townsend vs. Minn. Cold Storage, 46 Minn. 121; 48 N. W. 682.

Miller vs. Thayer, (Kans.), 143 Pac. 537.

The rule in Kansas is cited and sustained as to that state in:

Clement Eustis N *Co. vs. Field & Co.,* 147 U. S. 467; 37 L. 244.

Point 4.

In actions at law, the right of recovery is limited to the date of the commencement of the action;

while in suits in equity relief is granted down to the time of the trial.

Under the reformed procedure as adopted by Congress, paragraph VII of the Amended Complaint tendered the issue relating to the payment to the bank, and all matters pertaining thereto were therefore directly involved in the replevin case although such payment was on June 10, 1916, after the case was instituted on June 3, 1916.

Duessel vs. Proch, 78 Conn. 3b3; 62 Atl. 152.
Kelly vs. Galbraith, 186 Ill. 593 (610).
Randel vs. Brown, 2 How. 406; 11 L. Ed. 318.
Peck vs. Geedberlett, 109 N. Y. 180, 16 N. E. 350.

Point 5.

Where one pays the debt of another in the absence of any contractual or legal obligation or of any privity of relationship to the debt, and without the request, acquiescence, or knowledge of the debtor, he is a volunteer in making such payment and cannot recover the amount paid.

Lipman Wolfe & Co. vs. Phoenix Assurance Co., 258 Fed. 544 (9th C. C. A.)

Point 6.

The law of *Res Adjudicata* embraces all justiciable causes involved in the controversy whether actually litigated or not.

The Last Chance Mining Co. vs. Tyler Mining Co., 157 U. S. 683; 39 L. Ed. 859.

Point 7.

The Amended Bill stated no grounds for equit-

able jurisdiction. It sought the recovery of money only, and all matters alleged were properly triable in a Court of Law, before a jury in an action for money had and received.

ARGUMENT.

The various questions involved will be presented under the following classifications:

(a) The Court erred in rendering decree for plaintiff upon *MATTERS OF FACT*, because the whole evidence is insufficient to show.

1. *Title* in the machines involved in the replevin case in the FORD MOTOR COMPANY. The evidence does show the title, ownership and right of possession in such machines were in defendants and appellants;

2. *The Rebates* allowed by the Court are sufficient in amount;

3. *That the Payment by Ford Motor Company* of $12,676.38 was other than voluntary or that appellee owed any duty either at law or by contract or sustained any privity of relationship to such indebtedness or the mortgages securing it as required or enabled it to pay such debt and thereby to become subrogated either at law or in equity to the rights of the mortgagee.

(b) The Court erred in rendering decree for plaintiff as a *MATTER OF LAW*, because all matters set forth in the Amended Bill were and are

Res Adjudicata and the Ford Motor Company was and is *Estopped* by the record in the replevin case from attempting to relitigate them.

(c) Court erred in entertaining jurisdiction of the Amended Bill and trying the matters alleged in this suit because the Amended Bill seeks a money judgment only and all matters involved therein are triable at law and involve only legal rights to be submitted to and tried by a jury under a claim of *Money Had and Received.*

At the trial in equity, oral evidence was introduced, which is set out in the Transcript at pp. 209 to 241, inclusive; in addition, certain exhibits were introduced, consisting of the entire printed Transcript and briefs in error, in the *replevin* case, and certain chattel mortgages, bills of lading and sight drafts set forth herein.

There is a stipulation on file in this cause wherein the parties by counsel agree that these exhibits need not be printed but can be used on this appeal by reference. This stipulation was approved by this Court and an order made accordingly.

We shall consider the outline of Argument last above set out and discuss the questions therein referred to, ~~seriatim.~~ seriatim

FIRST: MATTERS OF FACT.

(1)

The entire evidence is insufficient to show that the *TITLE* to the automobiles involved in the *re-*

plevin suit and in the mortgages was in the Ford Motor Company; but did show that such Title passed to Winchell and Hathaway.

The contract between these parties (pp. 10-36, especially par. 10, p. 15; par. 20, p. 17; par. 23, p. 19; pars. 28 and 29, pp. 23, 24; par. 33, p. 26; and par. 39, p 28) provides that Winchell and Hathaway shall pay 85% of the full advertised list price of the automobiles at the time of their consignment (par 10, p. 15); that in case of claims for damages against the Railroad Company the rights of the parties shall be as fixed in par. 20, p. 17, and that the Ford Company is relieved of liability to Winchell and Hathaway for injury or damage to the automobiles after delivery to carrier; also that Winchell and Hathaway shall pay taxes on such automobiles either in their possession or while in transit or otherwise for delivery to them (par. 23, p. 19); that the commission on all sales shall be 15% of the list price (which is the entire balance of such list price after the payment of the 85% to the Ford Company) and shall be allowed additional commissions on the net amount of business (*rebates* under Secs. 28 and 29, pp. 23-24); that they are allowed certain discounts on parts handled by them from their stock (par. 33, p. 26), and finally that the whole 85% of the list price on consigned automobiles, with cost of transportation, shall be paid on sight draft drawn by Ford Company when consignments are shipped and such payments shall be made

"when shipments arrive, or when sight drafts are presented." (par. 39, p. 28).

It is thus seen that by the contract the appellants were required to pay Ford Company the entire wholesale price, to-wit: 85% of the list price, plus all cost of transportation, before the automobiles were delivered to them. They were also required to pay all taxes and to relieve the Company of all damages to goods in transit or otherwise, for delivery to them.

The allowances of *rebates and discounts* based upon the volume of business included the cars in their possession, although they had not actually sold them to customers.

We quote from the testimony:

WITNESS McNAMARA: (pp. 290-300) (Ford Company's Chief Clerk in charge of Winchell and Hathaway matters) testifies as to sight drafts and shows several drafts drawn for 85% of the purchase price and "paid" before the machines were delivered to appellants.

WITNESS NORMAN: (pp. 300-306) (Manager of Ford Company at Portland) testifies to the meaning of par. VII of the Amended Complaint in *replevin,* and shows that the $3401.12 there offered as a tender is earned rebate on business done, after deducting the $12,676.38 paid to the bank, on June 10, 1916, after the *replevin* case was started on June 3, 1916.

WITNESS V. W. WINCHELL (pp. 306-310) (deceased defendant) says: "(p. 306) And you paid for them at the time they were delivered? A. Yes sir. Q. Did you ever pay any other price to the Ford Motor Company than the price you paid upon delivery? A. No sir.

(p. 307) You added to the price paid the Ford Motor Company your profit, did you? A. Yes sir. Q. And kept the money? A. Yes sir. Q. And if you didn't sell the car you simply had the car on your hands? A. Yes sir. Q. Did the Ford Motor Company take them back off you? A. No sir.

(p. 309) Witness identifies the sight draft representing six touring cars and one sedan which were paid for before they came into appellants' possession, and says, "Q. Was there any further sum remaining to be paid for these cars? A. No sir. Q. Nothing whatever, in any way, shape or form? A. No sir.

WITNESS F. M. HATHAWAY (p. 312) (defendant and appellant) says: "Q. State to the jury whether or not there was any further sum to be paid by you. A. No sir. Q .Then when you sold the cars you got your profit? A. Yes sir. Q. *And if you didn't sell them, you didn't get the profit. Is that right? A. They remained ours.*

The same witness gives the following important testimony on the question of rebates, and shows that rebates were allowed and paid on the cars received by appellants and paid for by them although the cars were not resold.

"(p. 311) Q. When you take the cars from the Ford Motor Car Company and pay them, they figure that on your bonus—(sic-rebates)—just as if you passed them out to the public, do they? A. Yes sir. Q. That is, they were sold, as far as the Ford Motor Car Company is concerned? A. That is the way. Q. And fully paid for, as far as you are concerned? A. Yes sir. Q. And if you don't sell them again, that is your loss, is it? A. They remain our property."

* * * * * * *

(p. 312) Q. Now, Mr. Hathaway, in all the years you have dealt with them, has there ever been a time, a single instance but what you have had to pay for the car on delivery to you? A. No, we only pay the one price. Q. And you pay that on delivery to you? A. No, we only pay the one price. Q. And you pay that on delivery of the car? A. Yes. Q. And you treat the car as yours and go on and sell it or dispose of it as you like? A. Yes sir. Q. You have done that for three years? A. Four years. I was with the Ford Company. Q. You were their agent over in eastern Oregon? A. Yes sir. Q. Were you ever called upon to make any further price—(sic—payment)—than the price you pay on delivery? A. No sir. Q. In all the 437 cars that you sold at Eugene, did you ever pay a cent extra over and above the price you were required to pay to get these cars? A. No sir. Q. Were you ever asked to? A. Never asked to. Q. Did they ever claim anything different? A. No, there was nothing.

WITNESS NORMAN (pp. 312-337) (Portland Manager of Ford Company) (recalled in rebuttal. Cross Examination) says, referring to the payment of the sight drafts identified at pp. 313-337:

"Q. Well you got your money out of it, didn't you? A. Yes sir. Q. And you made the cars to sell? A. Yes sir. Q. And you shipped them to them to sell? A. Yes sir. Q. And they were selling your cars only. Everything they sold were Ford cars? A. Yes sir."

Furthermore, each sight draft (Tr. pp. 313-337) was drawn as per invoice and bill of lading thereto attached—and the invoices specifically described the property, noting it as "Sold to Eugene Ford Auto Company, Eugene, Oregon. Charge, Same; Terms, Strictly Net Cash."

All the above testimony was given in the *replevin* case and is found in the Transcript in that case as well as in the present case. The entire Transcript in *replevin* was introduced here.

WITNESS F. M. HATHAWAY (pp. 227-235) gave oral testimony at the trial of this suit as follows: Q. (p. 229) Did you borrow any money from the bank for the Ford Motor Company and convert it to your own use? A. We had no authority whatever. Q. Did you do anything of the kind? A. No sir. Q. Whose property, if any, did you mortgage to the bank to secure payment of the notes? A. Mortgaged our own property. Q. Was it property that you owned and had paid for? A. Yes sir.

Q. And for which you held receipts in full? A. Yes sir.

All the above testimony is uncontradicted. The claim of ownership by appellant was not denied by the Ford Company, except that it asserts that its contract provides that Title shall remain in it until the cars are resold. But notwithstanding such contract the entire evidence established a course of dealing between the parties whereby Title passed to appellants for the following reasons: (a) Cars were paid for in full before delivery from the railroad company to the appellants; (b) The cars remained theirs and were carried over from year to year; (c) They paid all taxes levied against the cars; (d) which were shipped at their risk; (e) and added their profit to the price so paid and (f) in their settlement of rebate and added commissions to the 15% originally allowed, they charged and received and were paid rebates and commissions on the cars still in their possession although not sold to the public.

Stronger proof of title is not possible.

Such title was pleaded in the answer in the replevin case, and the verdict was in favor of appellants.

SECOND: MATTERS OF FACT.

(II)

REBATES. The uncontradicted testimony above quoted shows that appellants were entitled to re-

bates on the cars involved, and discloses, in connection with the testimony hereafter quoted, that the Court did not allow enough rebates.

The decree (pp. 181-182) allows $2138.10 with interest as a credit on the amounts claimed by Ford Company in this suit. This credit arises from the deposit money ($800.00) plus rebates ($2325.58) and upon which the Court erroneously allowed a credit of $987.48 by payment made Aprli 11, 1916. (See opinion of Court attached to this brief as Exhibit A).

At the trial of this suit WITNESS GEO. W. ALLING (accountant for Ford Motor Company at Portland) testified (pp. 235 to 241) that as such accountant he found a certain check paid to appellants as rebates. By agreement this check was afterwards filed. It is set forth in the Record at pages 257-258, and is dated April 11, 1916, and is *"3% on business."* Vol. 1915-1916.

The check was issued and paid in April, 1916, and the replevin case was not started till June, 1916.

That payment could not include the rebates on the cars in question, because the appellants did not borrow the money nor execute the mortgages to the First National Bank of Eugene until April 22, 1916, May 1, 1916, and May 24, 1916 (see Par. VI, Plaintiff's Amended Bill, pp. 94-95) and the drafts set forth therein (pp. 313-337). The following exhibits were not paid at that time, nor did the cars

represented by such drafts come into the possession of the appellants until after the receipt of that check for rebate of 3%. The Transcript shows:

Defendants Exhibit	For	Paid
A. (pp. 313-315)	$3327.54	May 24, 1916
B. (pp. 315-317)	$3327.54	May 24, 1916
Unnumbered (p. 327)	$3329.87	May 24, 1916
D. (pp. 329-330)	$	May 25, 1916

It is plain that the cars represented in these transactions could not possibly be involved in the check of April 11, 1916, and that rebates arose after April 11, 1916.

The evidence does not show that the rebate check involved was a payment on the amount claimed by appellants. On the other hand WITNESS WINCHELL (deceased defendant) shows (p. 310) (Testimony quoted from Transcript in replevin case) that this particular payment was considered by him and Godon, who was an agent of the Ford Company in a tentative settlement about six months before the case was tried. *Winchell says,* "And the five per cent bonus on the amount of 36 touring cars at $493.25 and the sedan at $983.25? A. Yes. *Less a partial payment, probably six months ago,* some time ago on this bonus money. Q. And when you and Mr. Godon figured up the bonus money that he said he would get you, what did you figure it up at that time? A. I can't give the exact amount.

The verdict in the replevin case was rendered Sept. 6, 1916, (Tr. p. 271) and the check dated April 11, 1916, for 3% rebate was *"about six months ago"*; but that rebate of 3% was not a payment on the rebate of 5%.

WITNESS NORMAN (pp. 303-306) testifies at pp. 301-302: "Q. Now it is pleaded in the complaint here that the plaintiff tendered into Court and have tendered into Court with the Clerk, the sum of $3401.12. Will you state to the jury how that amount was arrived at as a refund on these cars? * * * A. I am not famliiar with those figures at this time. Q. What does the $3401.12 represent? A. *It represents the contract deposit and rebate they have coming on cars over a certain volume of business that they had on straight 15%; we pay a certain rebate, additional rebate, and that is the earned rebate.*

The draft set forth at pp. 257-258 of the Transcript is for $987.48. As per WINCHELL'S testimony, *supra*, we deduct this draft (for $987.48) from the amount of rebates ($3401.12) testified to by NORMAN, *supra*, and find a balance of $2413.64, to which should be added the legal interest from June 3, 1916, (date of filing replevin case) down to July 28, 1919 (date of trial of equity suit).

The decree (pp. 181-182) allowed rebates of $1338.10 only, and is too small by $1075.54 with interest.

THIRD: MATTERS OF FACT.

III.

The payment by the Ford Motor Company of $12,676.38 to the Bank was purely voluntary.

The Amended Bill (Tr. pp. 92-108) alleges two separate causes of action arising out of this matter, to-wit: *the First Cause of Action* (Tr. pp. 93-100) asserts a pretended equity because it says that Winchell and Hathaway borrowed the money from and executed the mortgages to the bank * * *" (Par. VI, pp. 94-95) *as the agents of the plaintiff, under and in accordance with the provisions of said contract referred to in paragraph III of this Amended Bill of Complaint, and said defendants after procuring said sums of money as the agents of the plaintiff converted the same to their own use and benefit,"* and then alleges the issuance of the injunction in this suit and its dissolution," and thereafter, that the Ford Company paid such judgment. Ford Company says that by reason of the payment to the bank of the sum of $12,676.38 on the chattel mortgage, and of the additional payment of $22,-077.50, with interest and costs, on the judgment, it made a double payment, under compulsion, because (a) the mortgage executed by appellant as agent to the plaintiff was a lien on the property involved in the replevin action, and (b) such amount was not credited upon the judgment in replevin, but, on the other hand, Winchell and Hathaway recovered $16,077.50 as the value of their ownership

in the automobiles, plus damages, and the said sum of $16,077.50 necessarily included the same amount which Ford Company paid the bank. The First Cause of Action claimed the right of subrogation.

The Second Cause of Action (pp. 100-107) asserts that the mortgages were valid because Winchell and Hathaway advanced 85% of the list price of the automobiles to the Ford Company, and (Par. VI, pp. 101-102) "thereby became and were entitled to and had a lien upon the automobiles to secure the repayment thereof, and thereby, upon receipt of the possession of said automobiles became entitled to and had a special property to the extent of said lien in said automobiles"—and that the effect of the chattel mortgage was to transfer such special property to the bank.

The Complaint then alleges in both causes of suit that the Ford Company was compelled to pay the mortgage to protect its right.

The replevin case was instituted June 3, 1916, and the payment to the bank was not made until June 10, 1916—one week later. Both Causes of Action, therefore, confess that the plaintiff wrongfully started the replevin action and used the process of the lower Court abusively, thereby pleading that the Ford Company was guilty of iniquity in relation to the subject matter in controversy.

Certified copies of the chattel mortgages are in evidence and are printed as part of the Transcript being pasted in after the Transcript was made up.

These mortgages disprove each Cause of Suit. They show that Winchell and Hathaway acted for themselves only and not as agents of the Ford Company in their execution; that they mortgaged the property itself as their own and asserted that they were owners of it; that they did not assign or transfer any pretended lien arising out of the payment of 85% of the alleged purchase price but that they recited in such mortgages that they owned the property and had it in their possession in Lane County, Oregon.

In addition they testified:

WITNESS WINCHELL (p. 310) (deceased defendant) (Quotation from the testimony in replevin csae):

"Q. Now, one of the witnesses has testified that after this case was commenced, and after the cars were taken, somebody has gone into the First National Bank of Eugene, and paid some debt of yours there. Did you ever authorize anyone to do that? A. No, sir. I didn't know of that being done. Q. Was it done with even your knowledge? A. No sir. Q. Long after the action was commenced and your answer filed? A. Yes sir.

WITNESS HATHAWAY (pp. 227-235) (Defendant and appellant) testified at the trial of this suit:

"Q. Mr. Hathaway, at the time Mr. Godon, if he was the person or representative of the Ford Motor Company, paid certain notes of Winchell and Hath-

away at the First National Bank of Eugene, Oregon, as Mr. Snodgrass has just testified, were you present when that was done? A. No sir. Q. Was it done with your knowledge? A. No. Q. Or with your consent? A. No sir. Q. Or with Mr. Winchell's knowledge of consent? A. No sir. Q. Did you know of the actual payment of the notes until after it had been done? A. It was the day after, as I remember it.

Further testifying as to the capacity in which Winchell and Hathaway acted in executing mortgages, WITNESS HATHAWAY says, (Tr. pp. 228-229):

Q. Mr. Hathaway, in borrowing the money from the bank—in borrowing the particular property, money represented by the notes set out in your answer from whom did you borrow the money? A. Borrowed the money from the First National Bank of Eugene. Q. For whom? A. For our own personal use. Q. I will ask you whether or not you borrowed it on your own individual credit. A. Yes sir. Q. Was this money that you borrowed borrowed for the Ford Motor Company? Did the Ford Motor Company have anything to do with the borrowing of this money? A. The Ford Motor Car Company didn't know anything about that transaction. Q. Did you borrow it for them, or did they have anything to do with it? A. They had nothing to do with it whatever. Q. Did you borrow any money from the bank for the Ford Motor Com-

pany, and convert it to your own use? A. We had no authority whatever. Q. Did you do anything of the kind? A. No sir. Q. Whose property, if any did you mortgage to the bank to secure the payment of these notes? A. Mortgaged our own property. Q. Was it property that you owned and had paid for? A. Yes sir. Q. And for which you held receipts in full? A. Yes sir.

The witness thereupon identified certain invoices and drafts some of which have heretofore been referred to, and some of which appear in the Transcript at pages 293 to 299, and others at pages 309 and 313, to 337.

An examination of each of these drafts shows that each recites that it is for property' 'SOLD TO EUGENE FORD AUTO COMPANY'' and each is stamped ''Paid,'' and was attached to an invoice of the property sold and paid for by each draft.

WITNESS HATHAWAY says, pages 229-230:

Q. And I will ask you whether or not you paid in full for the Ford automobiles that you mortgaged before you took them from the railroad company? A. According to our contract it was necessary for us to lift the drafts before we received any bill of lading. In fact the Ford Motor Company mailed those drafts to the First National Bank and then in turn the First National Bank notified us that the drafts were there, waiting us. Q. Did the cars come into your possession until you had paid for them? A. No, No.

And at page 231 the witness says: Q. Then after you had bought and paid for the cars, if the amount of merchandise that you purchased from the Ford Motor Company reached certain figures, they sent you back part of your money—is that right—or sent you back a certain rebate? A. Yes sir. It was just a matter of purchasing the cars from the factory; wouldn't make any difference whether they were sold; simply that they were paid for.

WITNESS SNODGRASS (pp. 214-221) (President First National Bank, Eugene) testified in this suit concerning the payment to the bank by Ford Company, stating that neither Winchell nor Hathaway were present at the time of the payment, which was made without their knowledge, so far as Snodgrass knew, by Mr. Godon: that Godon first piad the notes and the note teller cancelled them in the usual way and also cancelled the mortgages, and thereafter the representative of the Ford Motor Company about a week or a month after such payment, at least several days thereafter, returned and requested the bank to cancel the record of payment of the notes and mortgage and to mark such record as an error and give Ford Company a transfer of the notes and mortgage which he refused to do. The witness says (p. 217):

Q. Was there a request made more than once that you alter your records and change that transaction? A. It was made at least twice. Q. At least twice? A. Yes. Q. Did you decline ? A. We declined.

At pages 220-221, witness says that the Ford Company after paying the notes and mortgage and their cancellation requested the bank to change the endorsement, "our paid stamp endorsements on those notes, and to make an assignment of the notes and mortgage," and says (pp. 220-221):

Q. And what was the reason that the bank refused to conform to that request? A. Well, I told them that we had closed the transaction, and that we would not now, after the question had gone into court and been raised, be a party to the changing of our recrods and be put in that position. Between ourselves and our customers we are in court. The records and the cancellation must stand. Q. Why did the bank accept the money at that time? A. We were acting under the advice of our attorney who knew that there was a controversy, and the question being raised as to the ownership of the cars, and he advised us if they wanted to pay the notes to accept it. Q. May I ask who that attorney was? A. Mr. Bryson, E. R. Bryson, of the firm of Smith & Bryson. * * * Q. That was against the policy of the bank? A. It would be against the policy of the bank to do so without knowing it would be agreeable to our customer. Q. Mr. Bryson, your attorney, was in no way connected, in no way whatever, with Winchell and Hathaway, was he? A. I don't think he was. Q. Or with the Ford Motor Company? A. In no way, as far as I know.

The above testimony refutes any pretense that the mortgages were made by appellants as agents of

the Ford Company, or that appellants received or converted any money of the Ford Company; or that appellants ever mortgaged any property other than property which they had bought and paid for and which had been sold to them by the Ford Company and on which they were entitled to receive and have been allowed the amount of their rebates in the decree although the amount allowed is erroneous.

The payment to the bank was made during litigation and was not made by reason of any privity of contract or relationship or of any legal or equitable duty which Ford Company owed appellant or the bank, or any one else.

The claim in the First Cause of Suit that the mortgages were made as agents of Ford Company is directly contrary to the contract between the parties which says (Tr. p. 10):

> "WHEREAS, the second party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and first party is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:
>
> NOW, THEREFORE, this witnesseth:
>
> APPOINTMENT AS LIMITED AGENT.
>
> (1.) That first party hereby appoints second party its "Limited Agent" with certain authority as herein expressly stated only, for the purpose of negotiation sales of first party's product to users only, in the methods and upon terms

and within the territory herein specifically set forth.

Powers.

(2.) That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

There is no authority given in that contract either directly or impliedly, authorizing the appellants to make mortgages for the Ford Company or upon its property, or to execute notes for or in the name of the Ford Company.

By way of illustration, let us suppose that the automobiles after having been mortgaged had been damaged by fire or theft, so that their value was greatly depreciated and the security thereby had become so diminished that it would pay only 25% of the amount due the bank. Under these circumstances, would the Ford Company be personally liable to the bank for the other 75%? Or, would that Company have stood flat-footed on the provisions of the contract set forth in Par. 22, pp. 18-19?

It is not necessary to argue the above facts as the evidence is uncontradicted. It completely disproves all the alleged equities of the bill. It is noticeable that the lower Court made no findings on any fact alleged in the bill as basis for the alleged equities.

The decree is not supported by any evidence whatever, but is in direct conflict therewith.

The payment to the bank was purely voluntary.

MATTERS OF LAW.

Appellants urge that the decree is reversible as matter of law and that all matters involved in plaintiff's Amended Bill were necessarily part of and were determined in the replevin case, in which they were determined adverse to the Ford Company; and although error was assigned in the petition in error, yet such errors were never ragued, but were abandoned in this Court, and all matters involved in this suit became *Res Adjudicata,* and the Ford Company is estopped from relitigating them.

This contention is based upon the following matters of procedure.

(1) The Amended Complaint in replevin at Paragraph VII alleged a tender of $16,077.50 by an offer to pay $3401.12 to appellants; the difference between said sums is the amount paid to the bank by the Ford Company. This was denied in the answer, and was an issue.

The Complaint therefore brought into this case the question of payment to the bank under this plea of tender.

In the replevin case the question of tender was necessarily involved. The Ford Company asserted rights arising out of contract and not out of clear tort. The contract on which it depended provided how it might be cancelled. (See pp. 48, page 33; and 10-13, pp. 15-16).

If the contract governed the rights of the parties

then it required the Ford Company to make the tender of the 85% paid by appellants for the machines, before the Ford Company could claim possession. Ford Company was required either to prove the actual tender, or circumstances excusing it, or rights arising therefrom. No tender of the money was made or claimed to have been made to appellants, and the only payment made was to the bank. At the trial of the replevin case the Ford Company offered to make this proof, and the record in that case is set forth at page 289 of the Transcript herein as follows: WITNESS GODON:

Q. What was done with this $16,077.50? A. Why, after the United States Marshal had taken the cars and they were in his possession three days, I was notified, through my office in Portland—

MR. SMITH—Just a minute. That is objected to, if the Court please. Any conversation between him and the plaintiff, or any instructions that he gave after the action was brought is wholly immaterial.

COURT—I don't think it is material what became of the sixteen thousand.

MR. SMITH—As long as he didn't pay it to us, that is all there is to it.

COURT—As long as it didn't get to the defendants.

Thereafter, and at the close of all the testimony in the replevin case and on motion of attorneys for Winchell and Hathaway, all testimony relating to

the alleged payment to the bank, and the tender, was stricken and the jury instructed to disregard it, and to return a verdict for the defendants. The record shows: (Tr. p. 28):

"Thereupon the defendants made the following motion:

"MR. SMITH—There are two or three motions in relations to the record we want to make to keep the record straight on the evidence . We first move to strike from the consideration of the jury all evidence offered on behalf of the plaintiff as to the payment of the First National Bank of the twelve thousand dollars on the ground that it was not authorized by the defendants or made through any privity of relationship requiring plaintiff to make such payment. Upon the further ground it was a voluntary payment if made at all and cannot be charged to the defendants under any circumstances.

And thereupon the Court made the following ruling:

COURT—I think that is well taken as far as constitutes any defense in this case.

To the action of the Court in taking from the consideration of the jury the claim of the plaintiff for the amount of money paid by the plaintiff to the First National Bank of Eugene, Oregon, the amount of the lien imposed upon the automobiles in controversy by the defendants, the plaintiff duly excepted, which exception was duly allowed.

These rulings of the Court were never reversed;

on the other hand this Court affirmed the lower court.

(2) But even if the Amended Complaint did not involve the question of tender or its excuse or the equities arising out of its performance or non-performance, still the answer in the replevin case (Tr. pp. 263-268) affirmatively alleged the following:

(a) Title. (p. 264)

(b) The dealings between the parties whereby appellants paid the sight draft and bought the property which Ford Company sold them.

(c) A prior settlement of all matters in the complaint, and a relinquishment by the Ford Company of "every claim of possession to the said automobiles and each and every one thereof" (p. 266)

(d) Damages by the malicious and unlawful acts of the Ford Company by taking property of Winchell and Hathaway of the value of $18,555.25 and also by the destruction of their established business to their further damage of $25,000.00.

The damages so alleged greatly exceeded the value of the cars stated in the Amended Complaint (see pp. 261-262).

The Ford Company filed its reply (pp. 270-271) and did not in any manner assert any equity arising out of its payment to the bank, nor did it claim affirmatively any relief whatsoever, because of such payments, although the payment was made June 10, 1916, and the reply was filed July 28, 1916. (Tr. p. 269).

Appellants here argue that at that time the Act of Congress adopting the reformed procedure in actions at law was in force. (See Sec. 1251 B, U. S. Compiled Statutes, 1916, Volume II, Page 2023) and was passed after the adoption of Rule 30, Equity Rules by U. S. Supreme Court (See Vol. III, U. S. Compiled Statutes, 1916, pages 2509-2510, Section 1536).

But whether such amendatory act affected this case or not still the claims in the answer made it incumbent upon plaintiff to set forth its rights in the reply even under the old procedure, because the rights asserted by plaintiff arose out of contract and not clear tort, and the damages and counterclaims set forth in the answer exceeded those claimed in the complaint.

Zimmerman Wells Co., vs. Sunset Lumber Co., 57 Ore. 309; 111 Pac. 690; 32 LRANS 123.

(3) In addition, the Ford Company filed a petition for new trial on Nov. 8, 1916, (Tr. pp. 274-279) and sought (Paragraph IV, page 277) to have the amount paid to the bank credited on the judgment in replevin.

And thereafter filed a second petition for new trial or modification of judgment (Tr. pp. 285-289) again asking the Court to reduce the judgment by the amount paid to the bank.

Each of these motions was overruled on January 2, 1917 (Tr. p. 289), and the rulings involving such motions as well as those involving the instructions

given at the close of all the testimony in the replevin case (heretofore set out) were assigned as error by the Ford Company as Assignment VI and XII (Tr. pp. 280-281). The ruling excluding Godon's testimony was excepted to in the Ford Company's Bill of Exceptions, at Exception No. 11, Subdivision B. (Tr. pp. 281-282).

Although these rulings were duly excepted to and assigned as error yet they were never presented to this Court on the former appeal; therefore they became *Res Adjudicata* by the affirmance of the judgment in replevin.

Ford vs. Winchell, 245 Fed. 850.

(4) In this present suit application was made for preliminary injunction to restrain the collection of the replevin judgment of approximately $22,077.50 with interest and costs until the alleged equities arising out of the payment to the bank could be litigated.

Upon hearing the *Show Cause Order,* the injunction was denied and the preliminary restraining order dissolved. At the time that hearing was held the record consisted of (a) the Bill of Complaint (pp. 3-37); (b) Motion for Order to Show Cause and Temporary Restraining Order (pp. 37-38); (c) moving affidavits supporting the application (pp. 38-40); (d) The Order to Show Cause (pp. 42-43); (e) The Answer (pp. 44-69) which set forth all of the matters here pleaded as *Res Adjudicata* and embraced all the pleadings in the replevin case

with the motion for new trial, and was accompanied by affidavits supporting the motion to dissolve. (Tr. pp. 80 to 91).

At that hearing, the entire record in error in the replevin case was considered by the Court and the order was made dissolving the temporary restraining order and refusing the injunction, *pendente lite.* (Tr. pp. 91-92).

POINTS AND AUTHORITIES APPLIED

Applying the points and authorities heretofore set out to the record in the condition as disclosed above, appellants argue:

I.

TITLE.

The question of Title was directly tendered in the answer in the replevin case; and while ordinarily an action in replevin sounding in pure tort involves the question of possession only, yet, here, the action was founded upon contract, and the defense alleged title by purchase from the Ford Company. The answer, therefore, brought the question of title directly into the case, and the verdict and judgment for Winchell and Hathaway determined that issue, and the affirmance on appeal concluded the question.

Bauer vs. Rynd, (Cal.) 150 Pac. 780.

Furthermore, the facts heretofore discussed and proven anew in this suit under a claim of title, established without contradiction that the title to

the automobiles was in these appellants as matter of fact.

POINTS 2, 3, 4, 5, AND 6.

RES ADJUDICATA AND ESTOPPEL

The importance of this question is apparent from repetition. It arises out of the proceedings in the replevin case and their affirmance, as well as those at the hearing of the temporary injunction.

The entire equities asserted in the original and amended bills are claimed because of the payment to the bank. Appellants argue that such question was necessarily presented by Paragraph VII of the Amended Complaint in the replevin case, as well as by the offer of testimony in support thereof, and the ruling thereon adverse to the Ford Company, both in the offer of evidence and in the proceedings at the close of the testimony, and also by the original and second petitions for new trial and modification of the judgment entered in that case, and again by the Bill of Exceptions and Assignment of Error therein.

It is also urged that even if the complaint did not introduce the equities under the plea of tender, still, the condition of the answer required that such equity be set forth in the reply, and in the absence thereof, all matters relating to the payment to the bank are Res Adjudicata, because they were justiciable under (a) the old procedure as well as (b) the reformed procedure.

Appellants argue that A. C. March 3, 1915, C. 90, 38 Stat. 956 (Section 1251 B, U. S. Compiled Statutes 1916, Vol. II, p. 2023) adopts the reformed procedure in Federal Courts and is directly applicable to the record here presented. That section reads:

> "In all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of (and) seeking the relief prayed for. In such answer or plea equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. *In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review is sought by such writ of error or by appeal the appellate court shall have full power to render such judgment upon the record as law and justice shall require."*

This amendment required all equities involved in the plea of tender to be set forth either in the complaint or the reply, in the lower court and also requires a trial *de novo* on the record in the Appellate Court.

The Ford Company has therefore been before two courts, each and both of which could have granted it relief because of its alleged equities. It sought relief in the various ways heretofore shown

in the Lower Court, and was denied recovery there as disclosed by the Record in Error. Thereafter it sought review in this Court and failed to present such claim of alleged equities or the rulings of the Lower Court adverse thereto for adjudication, although the Act of Congress expressly says:

> "Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

This act has been construed in the following cases wherein pertinent comment is made.

In *United States vs. Richardson,* 223 Fed. 1010. (4th C. C. A.) Point 3 of Syllabus reads:

> "Act Cong. Mch. 3, 1915, authorizing equitable defenses in actions at law substantially abolishes all technical distinctions between proceedings at law and in equity."

In *U. P. R. Co. vs. Syas*, 246 Fed. 561, (8th C. C. A.) Point 1 of Syllabus says:

> "Under judicial code * * * declaring that in all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill, equitable relief may be granted in an action at law, but, in view of Const. Art. 111, Sec. 2, declaring that the judicial power shall extend to all cases in law and equity the act did not in any way except as to procedure, change the essential distinction between law and equity cases in equity being those which in the jurisprudence of England were so called as contradistinguished from cases at common law at the time

of the framing of the Const.; and hence, when equitable relief is asked in an action at law the case for equitable relief should be tried as a case in equity and first disposed of before proceeding in the action at law."

In *Burroughs Adding Mach. Co. vs. Scan. Amer. Bank,* 239 Fed. 179, Point 1 of the Syllabus reads:

"Under Act Mch. 3, 1915 * * * providing that in all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing on the equity side of the court, a buyer can plead the equitable defense of fraudulent misrepresentation in an action of assumption against him by the seller for the purchase price of the goods."

In *Maine Northwestern Development Co. vs. Northwestern Commercial Co.,* (9 C. C. A.) 240 Federal 583, (per Ross, J.) Syllabus, Point 1, reads:

"Under judicial code * * * providing that in actions at law equitable defenses may be interposed by answer, that review of the judgment or decree in such case shall be regulated by rule of court, and that 'whether such review be sought by such writ of error or by appeal, the Appellate Court shall have full power to render such judgment upon the record as law and justice shall require' in the absence of a rule of court to the contrary it is not important whether such a case is tried by legal or equitable procedure or whether it is reviewed on writ of error or appeal."

In *Upson Nut Co. vs. American Shipbuilding Co.,* 251 Fed. 707, Syllabus Point 1, reads:

"Where plaintiff sued at law for breach of con-

tract, it was admissable for defendant by cross petition to seek reformation of the contract under judicial code." (Sec. 274-B as added by Act of Mch. 3, 1915.")

These interpretations placed upon the amendment evince a clear purpose on the part of the Courts to give the amendment full scope, viz: to adopt the reform procedure in actions at law and to permit the litigation of a controversy in its entirety although instituted at law.

It is a trite maxim that where equity once obtains jurisdiction of a cause it adjudicates all matters connected therewith and administers complete relief both legal and equitable; and, by the above amendment (Act March 3, 1915) Congress has provided for a complete adjudication of all justiciable rights in actions at law whether such rights are legal or equitable.

At bar, we urge that because the Ford Motor Company asserted its alleged relation with the bank coupled with its tender as set forth of Paragraph VII of the Amended Complaint it brought the entire issue into this case; and, further, that when Winchell and Hathaway sought affirmative relief in their answer, it became the duty of Ford Motor Company to set forth its alleged equities in its reply, even if it had not already tendered the issue in its complaint. We also insist that when the Ford Motor Company sought to prove its right by virtue of such payment to the bank and took exception

to the proceedings shown while the WITNESS GODON was on the stand, and also saved its exception to the instruction given at the close of the testimony in the replevin case, and thereafter presented its alleged equitable claims by way of petition for new trial seeking relief in both its original and second petitions that it placed all its equities before the Court for determination in the former case; and, because of the broad powers given this Court by the amendment the entire replevin action was triable de novo on the record in order that substantial justice might be done.

It is plain that the Ford Company is concluded by the former record.

PROCEEDINGS IN REPLEVIN CASES.

Whether this case is governed by the old or the reformed procedure, the result is the same to the Ford Company.

(a) OLD PROCEDURE. If this procedure be adjudged the correct one, then the Ford Company should have set up its affirmative rights in reply to the answer as the defendants sought damages in excess of those alleged in the complaint.

Zimmerman Wells Co. vs. Sunset Lumber Co., 57 Ore. 309, supra.

(b) THE REFORMED PROCEDURE. In all states which allow equitable and legal relief to be granted in the same action, it is universally held that actions in replevin are under the rule.

Kansas is under the Reformed Procedure, and its decisions apply the rule to replevin cases.

Gardner vs. Risher, 35 Kans. 93.

Miller vs. Thayer, 150 Pac. 157, (*collating* Kansas Cases.

The rule in Kansas was reviewed and sustained by the Federal Supreme Court in

Clement Eustis & Co., vs. Field & Co., 147 U. S. 467; 37 L. 244, (Per Mr. Justice Shiras).

The Syllabus reads:

"In an action of replevin to recover a mill under and by virtue of a chattel mortgage thereon where defendants set up as a defense damages for a breach of a warranty of the mill and for delay in delivering it and was allowed such damages as a set off in that action, he is precluded form bringing a further action for the recovery of such damages and a judgment in the former action is a bar to the subsequent one."

From the opinion we quote:

"The use of a so-called action as a mode of enforcing provisions of a contract in writing seems scarcely consistent with the nature and purpose of that form of action as understood and enforced in England and the older states ofthe Union; but as the Supreme Court of Kansas in the case already cited, has approved of such a proceeding and has likewise held that it is competent for a defendant in replevin to set up as a defense unliquidated damages arising out of a breach by the plaintiff of the contract, and as the plaintiffs in error in the present case themselves resorted to such a defense and obtained its benefit, it was not

error in the Circuit Court of the United States for the District of Kansas to hold that plaintiffs in error were precluded by the verdict and judgment in the replevin suit."

And again the Court says:

"Moreover the record shows that in point of fact the defendants did plead a setoff in the replevin suit and had the benefit of such a plea and it seems to us that they cannot now be heard to say that the plea was not allowed in such a case. *There is high authority for saying that, as the question was a subject of judicial inquiry in the action of replevin, it would not be open elsewhere even in behalf of the plaintiff in replevin against whose contentention the set-off was allowed.*

Bartlett vs. Kidder, 14 Gray, 450.
Merriam vs. Woodcock, 104 Mass. 326.

Other authorities state the rule thus:

Gilbert vs. Husted, 50 *Wash.* 61; 96 Pac. 835; (per Rudkin, J).

"(p. 66) On the merits of the case it is first contended that a counterclaim for damages arising from a breach of the moving contract could not be interposed in this form of action. The two contracts formed a part of the same transaction and must be construed together."

In Ames Iron Wks. vs. Rea, 56 Ark. 450, 19 S. W. 1063, it was held that in an action of replevin to recover goods sold with reservation of title in the vendor until the purchase price was paid, the vendee may in defense counterclaim the damages sustained on account of the vendor's

failure to deliver the goods at the time agreed and tender to the vendor the balance due on the purchase price after deducting such damages; and this rule meets our approval, etc."

In *DeGrott vs. Veldboon* (Wis.) 166 N. W. 662, the right to counterclaim in an action of replevin under the Code is sustained.

In *McCormick Harvesting Mach. Co. vs. Hill,* 79 S. W. 745, 105 Mo. App. 544, it was held that a counterclaim on a money demand may be set up for affirmative relief as well as to defeat plaintiff's claim in replevin.

☞In *Ramsay & Bro. vs. Capshaw,* 71 Ark. 408, 75 S. W. 479—an action in replevin—the defendant was allowed to recoup damages which he had suffered by loss of profit resulting from plaintiff's refusal to carry out an agreement under which the machinery involved was bought.

In *Collins vs. Leather Co.,* 190 S. W. 990 (Mo. App.) it was held that a plaintiff MUST, IN HIS REPLY, dispute a claim set forth in the answer.

In 34 CYC. 1418—Note 88, and
Townsend vs. Minn. Cold Storage, 46 Minn. 121; 48 N. W. 682 it is held that counterclaims may be pleaded in replevin actions.

In *Cobbey on Replevin,* 2d Edition, Sec. 1148, we find:

"The judgment in replevin should so far as possible adjust the equities which arise between the parties to the suit in its progress, and in a

suit by the general owner against one who claims a special interest. If defendant's interest in the property expire, or in extinguished after the suit is brought and before judgment, such fact should be shown and considered in rendering judgment, which in such cases should be for costs only. In claim and delivery brought to get possession of property in order to sell it to satisfy a lien, if all the parties are before the court, the court should settle the rights of all parties. As the plaintiff is but a trustee, the value of its interest should be ascertained. In Iowa several replevin suits may be consolidated and tried on equitable principles.

The Supreme Court of Oklahoma has applied the rule under the Reformed Procedure to actions in replevin in the following cases:

Brook vs. Bayles, 6th Okla. 568; 52 Pac. 738.
Bottoms vs. Clark, 38 Okla. 243; 132 Pac. 903.
Stone vs. American National Bank, 34 Okl. 786. 127 Pac. 393.

Emerson-Brantingham Implement Co. vs. Ritter, (Okla.) 170 Pac. 482 reviews all the authorities and adheres to the broad rule announced in Cobbey on Replevin Sec. 88, supra, and *Brook vs. Bayless,* 6th Okla. 568; 52 Pac. 738.

This rule follows the adoption of the reform procedure as a necessity, because courts of equity have always granted complete relief down to the day of trial.

Peck sv. Goodberlatt, 109 N. Y. 180, 16 N. E. -150.
350.

16 Cyc. 479.
Duessel vs. Proch, 78 Conn. 343, 62 Atl. 152.
Kelly vs. Galbraith, 186 Ill., 593 (610); 58 N. E. 431; (436) Column 2.

In *Randel vs. Brown,* 2 How. 406; 11 L. Ed. 318, the U. S. Supreme Court says:

"* * * for it is the rights of the parties, at the time the decree is rendered that ought to govern the court in rendering the decree."

In *Clement Eustis & Co. vs. Field & Co.,* 147 U. S. 467, 37 L. Ed. 244, the Federal Supreme Court notes a clear distinction between those actions in replevin sounding in clear tort and those arising out of or based upon, contractual relations.

In the contract cases the authorities are unanimous that damages may be recouped, set-off, or counterclaimed, and that all rights under the contract are directly involved.

Here the Ford Company grounded its original replevin action upon a preexisting contract and is therefore clearly under the rule for which we contend.

It was the undoubted intent of Congress by the Act of March 3, 1915, to require the litigation of all rights such as are involved in the relations between the parties to this record, in one controversy and to give the Appellate Court the power to grant complete relief on review whether by appeal or error.

We therefore urge that all matters involved in this suit wherein the Ford Company asserts any equity because of its payment to the bank, were triable in and were within the issues of, the replevin action; and because the Lower Court ruled adversely to the Ford Company's interests in that case and the judgment was affirmed the matters involved in the complaint here are Res Adjudicata.

In 34th Cyc., p. 1418, paragraph 5, the text reads:

> "Waiver of and Estoppel to set up Defense. The general principles of waiver and estoppel are applicable to the question of waiver of or estoppel to set up defenses in actions of replevin."

If we are right in our analysis of the law, then this cause should be reversed with directions to dismiss the bill.

RES ADJUDICATA AS TO DEPOSITS AND REBATES.

We anticipate that opposing counsel will urge that our claims for rebates and deposit money are as much within the rule of Res Adjudicata as the matters alleged in the bill.

As to the deposit money, however, special provision is made in contract, Paragraph 40 (Tr. p. 29), as follows:

> "As a guarantee of the full faithful performance by the second party of all the terms and conditions of this agreement, the second party

In any event, the replevin case involved the question of defendants' right of possession and its value, and if such right could be extinguished by repayment of the 85% price list, it would also be extinguished by payment to the bank of part of such sum and tender or payment of the balance to the defendants.

At the trial the court excluded evidence of payment to the bank upon the objection based solely on the ground that such payment was voluntary—as heretofore argued.

It is plain, therefore, that the matter of payment was involved in the replevin case whether treated as evidence of title or of extinction of defendants' right of possession and the rule of *res adjudicata* applies.

has deposited with the first party the sum of eight hundred dollars ($800.00) in cash, and *it is agreed that the first party may, at its option, apply any part or all of said amounts towards the liquidation of any past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit. if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. ..In case of cancellation or termination of this contract as herein provided, such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agency and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party.*"

It is thus seen that the deposit money was not due at the time of the trial of the replevin action nor could it become due until after the final determination of all rights between the parties which could only be fixed on a concluded settlement after the contract was terminated.

The contract provides at paragraph 5, (Tr. pp. 12-13) for damages for breach of territorial restrictions and says:

"For any and each violation of the same by the second party, second party hereby agrees to pay to the first party the sum of two hundred and

fifty dollars ($250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the first party, or from any sums which first party may owe for business done, to second party."

On May 24, 1916, Ford Motor Company wired appellants as follows: (Tr. p. 258, Ex. 1.)

"Portland, Oregon, May 24, 1916.

To Eugene Ford Auto Company,
Eugene, Oregon.

Be advised that your contract is cancelled. The territory and your stock will be taken over by Eugene.

FORD MOTOR COMPANY."

Thereafter and prior to the institution of the replevin action an attempt was made to adjust and settle all matters between the parties but Ford Motor Company refused to carry out the settlement. (Tr. in Error, p. ....). Though the contract was cancelled on May 24, 1916, the matter of the application of both the deposit money and the rebates under Paragraph 5, supra, was still at large, and undetermined, and would remain so until a final accounting and settlement between the parties.

By the express terms of Paragraph 40 (Tr. pp. 28-29) of the contract, the

"Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party."

A like provision governs rebates or additional

commissions. Paragraph 29 (Tr. pp. 23-24) of the contract, concludes as follows:

> "If any payments shall have been made to second party during the year on the one per cent (1%) basis or any lower basis than he shall finally be entitled to, such payments shall be credited on the final amount owing him and shall be deducted when he becomes enttiled to and shall receive the higher percentage."

The above provisions give the Ford Company the right to retain both the deposit money and the rebates until a final and complete settlement of all matters between it and appellants was made, and to apply such sum to the satisfaction of any or all of its claims arising out of the contractual relation between them.

How, then, can it be held that appellants were compelled, or could elect, to wage their claims for either the deposit money or the rebates until such settlement was had or their rights renounced. There was no settlement, at the time the replevin case was started and tried nor had the Ford Company at that time denied the right of appellant to either the deposit money or the rebates and therefore all rights in relation to both funds were in abeyance and were not subjects for judicial inquiry.

The first requisite of a counter claim is that it shall be DUE at the time it is pleaded. If it is not DUE, it cannot be counterclaimed or set-off or recouped.

We therefore argue that the rebates and deposit money were not due at the time of the trial of the replevin action and were not justiciable questions and hence, could not have been determined in that case.

ADEQUATE REMEDY AT LAW.

The Amended Bill states no fact for equitable cognizance. It seeks nothing but a money judgment. All of the rights purporting to arise in virtue of the payment to the bank were triable at law, before a jury, in an *action* for Money Had and Received.

Vol. 14 Ency. Pl. & Pr. pp. 53-54

Lipman Wolfe & Co., vs. Phoenix Assurance Co., (9th C. C. A., per Gilbert, Circuit Judge.) 258 Fed. 544.

Such an action is applicable in all cases where one has money in his possession which belongs to another and for which the holder gave no consideration.

An examination of the Amended Bill discloses (1) that the purely equitable ground of injunction contained in the original bill was not restated; (2) that the plaintiff did not seek any rights flowing from its pretended right of subrogation such as a mortgage foreclosure or other remedy purely equitable or (3) that plaintiff sought any relief other than a pure money judgment which is laways strictly legal.

We do not admit that plaintiff had a right to maintain either an action or a suit against appellants in any form or forms whatsoever; but we say that if the Ford Company had any rights to recover at all, they arose solely by reason of a double payment and not otherwise.

This was apparently the view of the trial judge as disclosed in his opinion, copy of which is attached hereto, as Exhibit A. An examination of that opinion shows that the trial judge not only falied to find the equities as alleged in the bill but that the recital of facts is with the defendants.

It is therefore urged that this cause should have been transferred to the law side of the Court, and perhaps the complaint recast, and the matter tried before a jury.

In conclusion, we submit that the decree should be reversed and the bill should be dismissed for want of equity and lack of proof and that the amounts awarded to appellants as deposit money and rebates should be increased as to the rebates as heretofore shown.

Respectfully submitted,

ISHAM N. SMITH,
Attorney for Appellants.

Suite 612 American Bank Bldg.,
Seattle, Washington.

Service accepted
.... day of January, 1920.

....

Attorney for Appellee.

"EXHIBIT A"

—OPINION—

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

FORD MOTOR COMPANY, a corporation,
Plaintiff,
vs.
F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix, etc.,
Defendants.

Portland, Oregon, July 28, 1919.

MEMORANDUM by R. S. BEAN, District Judge:

In September, 1915, the plaintiff and defendants entered into a written contract by the terms of which the plaintiff appointed defendants its agent for the sale of automobiles in a designated territory. The contract was to govern all transactions between the parties until July 1, 1916, but by its terms could be terminated or cancelled in the meantime by either party, with or without cause, in which event the plaintiff could at its option retake possession of the unsold automobiles in possession of the defendants, returning to them the deposits thereon. Under the contract plaintiff was to con-

sign automobiles to the defendants from time to time, "to be sold to users only and not for resale upon bills of sale executed" by the plaintiff and "at prices to be fixed by it." The plaintiff was to retain "full title to each automobile until actual bill of sale signed and executed" by it had been delivered to the purchaser. The defendants were to advance to the plaintiff in cash 85% of the list price of the automobile before receiving possession thereof, and to pay the freight from the factory, and to have a lien upon the automobiles for such advances. In pursuance to the contract and prior to May 25, 1916, the plaintiff had consigned to the defendants thirty-six automobiles which were unsold, and upon which defendants had advanced and paid sixteen odd thousand dollars. In order to do so they borrowed from the First Natinal Bank of Eugene twelve thousand odd dollars on their promissory notes, securing same by mortgage on the automobiles. On May 25, 1916, plaintiff cancelled the contract and on June 3, of that year, commenced an action in replevin to recover possession of the automobiles above mentioned, and on June 5th, they were taken from defendants' possession by the United States Marshal under a writ and delivered to the plaintiff, who has ever since retained possession thereof.

On June 10, 1916, the plaintiff, without the knowledge of defendants and without being requested by them to do so, paid to the First National Bank of Eugene $12,676.25, being the amount then due the

bank for money previously borrowed by defendants and secured by mortgages on the automobiles. The notes and mortgages were thereupon cancelled.

Thereafter issue was joined in the replevin action and on September 11, 1916, a trial resulted in a verdict and judgment in favor of defendants for $16,-077.50, being the amount advanced by them, and $6,000.00 damages for the unlawful taking thereof, for the reason that plaintiff had not returned or tendered to the defendants the advances as required by the contract. The judgment was subsequently affirmed by the Court of Appeals (245 Fed. 850) and paid by plaintiff.

Thereafter plaintiff brought this suit to be subrogated to the rights of the bank as against the defendants and to recover from defendants the amount paid by it to the bank. The defendants, by their answer deny liability, and also claim a set-off or counterclaim for eight hundred dollars, a deposit made by them at the time the contract was entered into and pursuant to its terms, and the further sum of $1900.60 for commissions earned and unpaid, with interest on each of such items at six per cent per annum from May 25, 1916.

From the above statement it appears that if defendants are permitted to receive and retain the benefit of the payment made by plaintiff to the First National Bank they will have received from plaintiff double payment to that extent of the advances made by them, once through the judgment

in the replevin action, and the other by the payment and satisfaction of their notes to the bank. The defendants claim that the payment to the bank having been made without their request or knowledge was a mere voluntary payment and therefore plaintiff is not entitled to recover from them the amount so paid.

Under the contract between the plaintiff and defendants as interpreted by the Court of Appeals in the *Boone* case (244 Fed. 335) the title to the automobiles was in the plaintiff notwithstanding the defendant had advanced and paid to it the entire amount it was entitled to receive under the contract. It therefore had an interest in the property which it could protect by paying he lien. It thus made the payment to the bank in good faith believing that it was necessary to do so in order that it might recover possession of its property, and to enable it to proceed with the replevin action. Having done so it is, in my opinion, entitled to be subrogated to the bank as against the makers of the mortgage. (37 Cyc. 378). The right of the plaintiff by reason of such payment was not at issue in the replevin action and was not and could not have been tried therein, nor was the right of the defendants to recover the deposits made by it or the unpaid commissions involved in such action. The only question in that case was the value of the property taken by the plaintiff under the writ of replevin in case it could not be returned, and damages for such unlawful taking. There is no controversy as to the

amount of the deposit made by the defendants at the time the contract was entered into, and it is admitted that it has not been repaid. The amount of earned and unpaid commission is alleged in the answer to be $1900.60, but the evidence shows the gross amount to be $2325.58 upon which there was a pyament of $987.48 made April 1, 1916, leaving a balance of $1338.10.

I conclude therefore that the plaintiff is entitled to judgment against the defendants for $12,676.38 with legal interest thereon from June 10, 1916, less the sum of $2338.10, with legal interest from May 25, 1916.